No. 2716.

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit

OREGON SHORT LINE RAIROAD COMPANY,
a Corporation,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

Upon Writ of Error in the United States District Court for the District of Idaho, Eastern Division.

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Since the question involved in this hearing is concise and free from complications, and since such question arises solely upon the pleadings in the case, which pleadings are set out in full in the transcript (pp. 7-24) and a fair summary of the same given in the statement of the case appearing in the brief of Plaintiff in Error, we make no further statement, but proceed directly to our argument and authorities.

ARGUMENT.

The position taken in the brief of plaintiff in error, stated concisely, is as follows: In case of services rendered by any employe of a common carrier in violation of the Hours of Service Act, the carrier cannot be held liable therefor except the following be either proved or admitted, to-wit: (1) That some officer or managing agent of such carrier, under whose supervision such employe worked, had *actual* knowledge of the excess service performed by such employe; and (2) such officer or managing agent actively consented after the acquirement of such knowledge to such excess service by such employe.

In support of this position, plaintiff in error, at page 6 of its brief, sets forth nine propositions of law which serve as the frame work of the argument which follows. As to some of these propositions we have no criticism to make when the same are applied to an appropriate state of facts. Thus, as to those propositions numbered 2, 3, 4, 7, and 8, when considered in the light just suggested, we would accede to the same as perfectly acceptable principles. This is probably true, also, as to proposition 5, as we understand it; it is perhaps a trifle vague, and, as such, is rather a generalization than a principle. But we submit that, as shown in our detailed analysis which follows, the propositions of plaintiff in error above referred to are entirely beside the question here involved and have no proper application to this state of facts. Before going into detail and making a citation of authorities it has seemed that it may be not inappropriate to state in an introductory way certain propositions of law which are so universally known and accepted as to require no citations in support thereof.

It must be borne in mind in the examination of a question of this character, that a common carrier is in very many respects subject to regulations and rules of law which would not in any way be permissible if the subject of such rules and

regulations were a mere individual citizen acting in his private capacity, or even a corporation engaged in business of a private nature. A common carrier is permitted to reap and enjoy the fruits of an enterprise which is inherently a public utility. A common carrier performs a public service, and is, therefore, held to be to a considerable extent under legislative control exercised for the benefit of the public which makes possible the utility controlled by such carrier. And so, in many instances, a common carrier is held to a more rigid performance of the duties imposed upon it by law than is a person or corporation acting in a merely private capacity. To that end a carrier is deprived at times of the defenses which would be open to an individual.

In regard to the specific contention made by plaintiff in error, that a carrier cannot constitutionally be precluded from showing a lack of knowledge on its part, or on the part of the officer or managing agent in charge, of services performed by an employe in violation of the terms of such act, that contention is not borne out either by the specific decisions in point or by the general or common law governing the rights and liabilities of a common carrier. For instance, it is, and always has been, the universally accepted rule that a common carrier insures the safe carriage and delivery of freight or baggage entrusted to it, and that in the event of loss or injury thereto the carrier is liable absolutely and cannot be heard to assert its lack of negligence or due diligence in the handling and transportation of the articles consigned to it. Under this rule, a railroad company is liable for all acts of all its agents relating to a consignment of freight. If loss or injury occurs, it is entirely beside the question for the carrier to deny knowledge of the act or acts responsible, or to deny consent thereto, or to allege that such act or acts were performed not only without the knowledge or consent of the carrier but in direct violation of the carrier's specific orders to its employes. And certainly

there is nothing unconstitutional or even unreasonable in the requirement which holds a carrier to insure that its employes will render service within the provisions of the Hours of Service Act, and to hold it liable for violations of the rule of such Act by such employes. The two rules are exactly analogous so far as the legal right of the carrier is concerned. And while the one is calculated to protect a property interest merely, the other is specifically designed to accomplish a far higher purpose, the protection of human life and limb. (See Title, Act of March 4, 1907, 34 Stat., 1415).

I.

THE ACT: ITS NATURE AND PURPOSE.

The Act under consideration (34 Stat. 1415) is a remedial Act intended to promote the safety of the traveling public, and the portions thereof applicable to the case at bar are as follows:

1. "That the provisions of this Act shall apply to any common carrier or carriers, their officers, agents, and employes," etc. (Section 1).

2. "That no operator, train dispatcher, or other employe who * * * * receives or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four hour period in all * * * stations continuously operated night and day," etc. (Section 2).

3. "That any such common carrier * * * * permitting any employe to * * * remain on duty in violation of the second section hereof, shall be liable to a penalty" * * * "In all prosecutions under this Act the common carrier shall be deemed to have had knowledge of all acts of all its officers and agents." (Section 3).

Plaintiff in error throughout its entire brief has treated the question presented as thought the Act above quoted were criminal, and an action brought thereunder were conducted in the same manner and subject to the same rules of procedure as a criminal prosecution. In fact, the conclusion arrived at in that brief cannot be reached on any other assumption. It has required a most technical application of the most stringent rules of procedure designed for the protection of the defendant in a criminal prosecution. That the argument of plaintiff in error is without foundation in this respect is shown by the following authorities upon that point:

"This is not a criminal statute, and therefore is not governed by the rule of strict construction. It is rather a remedial statute which should be so construed, if its language permits, as to best accomplish the protective purpose for which it was enacted. Obviously, that purpose was to protect the safety of employes and the traveling public by prohibiting hours of service which presumably result in impaired efficiency for discharging their important duties. The end to be attained by the law is a a guide to its interpretation."

United States v. Atlantic Coast Line R. Co., 211 Fed. 897. (C. C. A. 4th Circuit).

"This law was passed to meet a condition of danger incidental to the working of railroad employes so excessively as to impair their strength and alertness. It is highly remedial; and the public, no less than the employes themselves, is vitally interested in its enforcement. For this reason, although penal in the aspect of a penalty provided for its violation, the law should be liberally construed in order that its purposes may be effected. The recovery is by a civil action, and the rules governing civil procedure apply."

See also

United States vs. Southern Ry. Co., 202 Fed. 828. (C. C. A. 8th Circuit).

Delano, et al., vs. United States, 220 Fed. 635 (C. C. A., 7th Circuit).

United States vs. Boston & M. R. Co., 168 Fed. 148.

Nor is plaintiff in error correct in attempting to find a distinction, inherent in their natures, between the Act in question and the Safety Appliance Act. (Brief of Pl. in Error, p. 21).

The two are closely analogous as to both form and purpose. The same method of construction should be followed as to each in order to effect the purpose for which the two Acts were intended.

"Of a closely analogous statute—the Safety Appliance Law—the Supreme Court, in Johnson vs. Southern Pacific Co., 196 U. S. 1, has said: 'The primary object of the Act was to promote the public welfare by securing the safety of employes and travelers and it was in that aspect remedial, while for violations a penalty of $100.00, recoverable in a civil action, was provided for, and in that aspect it was penal. But the design to give relief was more dominant than to inflict punishment, and the Act might well be held to fall within the rule applicable to statutes to prevent fraud upon the revenue, and for the collection of customs; that rule not requiring absolute strictness of construction.'"

United States vs. Kansas City Southern Ry Co., 202 Fed. 828, *supra*.

It follows, therefore, that the decisions heretofore rendered touching the purpose and construction of the Safety Appliance Law should be given great weight in arriving at the ultimate purpose which the Congress intended to be served by the Act under consideration. Concerning the Safety Appliance Law the Supreme Court has said:

"The Congress, not satisfied with the common law duty and its resulting liability, has described and defined the duty by statute. We have nothing to do but to ascertain and declare the meaning of a few simple words in which the duty is described."

And further,

"The obvious purpose of the Legislature was to supplement the qualified duty of the common law with an absolute duty, deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it."

St. Louis. I. M. & S. R. Co. vs. Taylor, 210 U. S. 281, 52 L. Ed. 1061.

"It cannot then be doubted that this Court in the Taylor Case considered the scope and effect of the Safety Appliance Act of Congress as directly involved in the questions raised in that case, and it expressly decided that the provision in the second section relating to automatic couplers imposed an absolute duty on each corporation in every case to provide the required couplers on cars used in interstate traffic. It also decided that non-performance of that duty could not be evaded or excused by proof that the corporation had used ordinary care in the selection of proper couplers or reasonable diligence in using them and ascertaining their condition from time to time. That the Taylor Case, as decided by this Court, has been so interpreted and acted upon by the Federal Courts generally, is entirely clear, as appears from the cases cited in the margin."

And further,

"In effect the contention is that the present action for a penalty is a criminal prosecution, and that the defendant cannot be held guilty of a crime when it had no thought or purpose to commit a crime, and endeavored with due diligence to obey the Act of Congress. This contention is unsound, because the present action is a civil one."

Chicago, B. Q. R. Co. vs. United States, 220 U. S. 559, 55 L. Ed. 582.

See also,

Delk vs. St. Louis & S. F. R. Co., 220 U. S. 580, 55 L. Ed. 590.

It therefore fully appears that the case at bar is a civil action with all which that term implies, based upon an Act of Congress which is highly remedial in its nature and which should be liberally construed, if its language is subject to construction at all, in order to give it full effect in serving the purpose for which it was designed.

Plaintiff in error has presented what it conceives to be the

proper construction to be placed by this Court upon the Hours of Service Act. Before any Act of a competent legislative body is subject to construction by the judiciary, it must appear that the language employed in the body of such Act is uncertain, vague, or ambiguous in some respect. If the language so used is plain and unambigouous the Act is not subject to construction or interpretation, but it becomes the duty of the judiciary to give effect to the plain meaning of such language.

> "To get at the thought or meaning expressed in a statute,* * * * the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning, which involved no absurdity nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted," etc.

> "So, also, where a law is expressed in plain and unambiguous terms whether those terms are general or limited, the Legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction."

> "Words are the common signs that mankind make use of to declare their intention to one another; and when the words of a man express his meaning plainly, distinctly and perfectly, we have no occasion to have recourse to any other means of interpretation."

And quoting with approval Law vs. People, 87 Ill. 395:

> "Nor are we justified in resorting to strained construction or astute interpretation, to avoid the intention of the framers of the constitution, or the statutes adopted under it, even to relieve against individual or local hardships. If unwise or hard in their operation the power that adopted can repeal or amend, and remove the inconvenience. The power to do so has been wisely withheld from

the courts, their functions only being to enforce the laws as they find them enacted."

Lake Co. vs. Rollins, 130 U. S. 662, 32 L. Ed. 1060.

We think it follows necessarily from the foregoing citations that the demand of plaintiff in error for a strict construction of the Act in question and an application of the rules of criminal procedure to the case at bar, must fail. We will endeavor in the further pages of this brief to point out sufficient reason why its proposed interpretation of the Hours of Service Act should not be adopted by this Court.

II.

THE ACT IMPOSES ABSOLUTE LIABILITY.

The railroad company, plaintiff in error, contends (1) that the only knowledge which should be imputed to it under the Act is knowledge of its managing officers and agents as distinguished from its employes; (2) that, therefore, unless it can first be shown that some managing officer or agent had *actual* knowledge of a violation of the Act, no knowledge whatever of such violation can be imputed to the carrier; (3) further, that neither the carrier nor any managing officer or agent thereof would be liable under the Act, even if knowledge of a violation were had by such officer or agent, unless the one having such knowledge had *actively consented* to the excess service constituting such violation.

In support of propositions (1) and (2) above stated, the railroad company in its brief attempts to point out an intended distinction between "officer or agent" and "employe," as used in the Hours of Service Act. (Brief, pp. 9-12). It reasons that since, under the terms of the Act, a superior officer or agent might become personally liable by requiring or permitting a workman under his supervision to render excess service, therefore such superior officer or agent is not himself an "employe." Just what process of reasoning produces this conclusion, we are not able to understand. The Act itself defines "employes" (Section 1) to mean "*persons actually engaged in or connected with the movement of any train.*" A yard master or train dispatcher, under whose orders other men work, if "connected with the movement of any train," is as truly an "employe" as any of the men under him. Excess service on his part is, beyond the peradventure of a doubt, a violation of the Act as truly as such service by one of his men. In his status as "employe," the carrier is responsible for his actions as much as for those of any other. Also, in his status as a superior in charge of other men, he can himself become liable

for the penalty provided in the Act. Just why this latter possibility frees him from the sweeping and inclusive definition of the term "employe," does not appear.

Nor is there any virtue in the company's attempted distinction between the terms "agent" and "employe." The double status of the superior agent of the company just pointed out does not depend upon the use of the term "agent" as indicating his one capacity, and "employe" as indicating his other. The two terms, as ordinarily used, are interchangeable, and either would be appropriate to indicate such person's connection with the railroad company. As one authorized to attend to the company's business and in its pay, he is an "agent" or an "employe," under the usual use of the terms, as one may choose to call him. And so also is each and every man working under him. It is true that by the terms of the Hours of Service Act there is, at least by implication, a division of the agents of a carrier into two classes. This division, however, is not in any sense based upon the distinction which plaintiff in error attempts to point out in its brief. That classification is rather, that those agents of the carrier engaged in or connected with the movement of any train shall be distinguished from other agents of the carrier not so occupied, by the term "employe." Under this classification, a superior or managing agent of the carrier may or may not be called an "employe," using the term in its more limited sense defined by the Act, depending upon the nature of his services. But there is most certainly no distinction made in the Act, by implication or otherwise, between managing agents on the one hand and the workmen of the company on the other. And so, to revert to our original illustration, the yard master or train dispatcher, if connected with the movement of trains, is an employe and may make the carrier liable under this Act by rendering excess service. He may also become personally liable for the penalty of the Act, although the men under him may

not; the reason for this is to be found in the fact that he is vested with supervisory authority and the others are not. Both alike are agents of the company, and both are "employes" under the definition given in the Act. The one has certain discretion and the power to give orders, and so may require or permit a workman to render excess service. The workman, on the other hand, has no such authority, his duties being largely ministerial, and so may not himself require or permit another to render such excess service.

It follows that when the Act was worded (Section 3) to provide that *"in all prosecutions under this Act the common carrier shall be deemed to have had knowledge of all acts of all its officers and agents;"* every agent, superior or inferior, discretionary or ministerial, was equally included. The carrier is charged with knowledge of *"all* acts of *all* its officers and agents." This language is as plain and unambiguous as language may be. Its meaning is simple, certain, and fully expressed. No room is left for construction or "astute interpretation."

Lake County vs. Rollins, 130 U. S. 662, *supra.*

Therefore, there is neither necessity nor authority to hold that Congress intended by the phrase "all agents" merely "administrative or superior officers and agents, with the power and authority to require or permit the employes to go, be, or remain on duty." (Brief, p. 10). On the contrary, it was plainly intended that the carrier should be conclusively charged with the knowledge of the agent rendering service in excess of the hours permitted by the Act as well as with any other knowledge which any other agent might have concerning such violation.

In support of proposition (3), *supra*, the railroad company (Brief, pp. 12-16) contends that, in addition to knowledge of

the excess service by a managing officer or agent of the carrier, the Act implies that such managing officer or agent must also have actively consented or authorized such service. It is argued that the word "permit" denotes positive consent on the part of the person charged. To this end, numerous cases are cited, nearly all of them pertaining to criminal actions in which it was attempted to hold a master or principal criminally liable for the act of his servant or agent, a husband liable for the act of his wife, etc.

As we have already pointed out, this action is in no sense a criminal proceeding and for that reason alone the citations of plaintiff in error are distinctly not in point. Nor does a common carrier stand on equal footing, as regards its legal rights, with an individual. We have no doubt that Congress, had it so chosen, could lawfully have enacted a criminal statute similar to the one under discussion and could have under such statute deprived the carrier of any defense based upon lack of knowledge or due diligence on its part. (See Chicago, B. & Q. Ry. Co. vs. United States, 220 U. S. 559 *supra*, at page 578). But the fact is, it did not do so and we are therefore not concerned with the rules of procedure and presumptions of innocence which obtain in a criminal prosecution. Stripped of these, the railroad company's brief touching the use of the word "permit" is left a mere superstructure of argument with no authority to support it.

Having stated in a preliminary way the construction of the Hours of Service Act contended for by plaintiff in error, together with what we believe to be its true meaning, we now set out authorities specifically in point which we believe effectually sustain our position.

Neither the construction of the Act, nor the reasoning in support thereof, by plaintiff in error, are novel. In *United*

States vs. O.-W. R. & N. Co., 218 *Fed.* 925, decided by the learned District Judge for the District of Oregon in December, 1914, the identical propositions and argument advanced by plaintiff in error were discussed and disposed of in favor of the interpretation which we have placed upon the Act in question. We cannot do better than to quote the language of the Court:

> "In arriving at this conclusion, counsel insist that the Act makes a distinction between officers and agents of the carrier on the one hand and the employes on the other, and that the knowledge imputed to the carrier by the third section is only the knowledge of its officers and agents, and not of its employes. * * *
>
> "It is at once apparent that the Act makes all officers and agents in appointive authority, or with supervision as to the time of service, as well as the carrier itself, amenable to its provisions, as it declares that 'any officer or agent thereof, requiring or permitting any employe to * * * remain on duty,' etc., shall be liable to the penalty prescribed. It may very well happen that an officer or agent may have appointive power or authority, or have delegated supervision as to the hours of service, who may himself be an employe whose time of service is regulated by the Act. For instance, we may suppose that a train dispatcher is authorized to appoint and fix the time of service of telegraph operators. In such a case the train dispatcher would be amenable to the law for permitting the operator to remain on duty overtime, and yet some other superior officer would be amenable for permitting the train dispatcher himself to remain on duty overtime. While the supposed case is probably not the fact, yet it affords a demonstration that the act, by intendment, was not designed to distinguish between officers and agents on the one hand and employes on the other, for it prescribes that the term 'employes' * * * shall be held to mean persons actually engaged in or connected with the movement of any train' — a special, but very broad, signification.

"But the imputed knowledge is 'of all acts of all its officers and agents.' The term 'agents,' it would seem, is here used in its broadest sense, because it comprises all agents.

" 'Agency, in its broadest sense, includes every relation in which one person acts for or represents another by his authority.' 31 Cyc. 1189.

"And again the learned author of the article entitled 'Principal and Agent,' in the same work, says:

" 'The relations of principal and agent and master and servant are frequently confused. In general the principles governing the rights, duties, and liabilities growing out of the two relations are the same, and to determine whether a given relation is one of agency or of service is of no consequence. This results from the fact that the law of principal and agent is an outgrowth and expansion of the law of master and servant.' 31 Cyc. 1191.

"It would therefore seem to follow that knowledge by the employe, in whatsoever capacity engaged, if connected with the movement of any train, under the act is tantamount to knowledge of the carrier, and this even if it be the knowledge only of the employe remaining on duty overtime.

"But I am not disposed to rest the case on this reasoning alone. The act is so nearly analogous in the respect under consideration to the Safety Appliance Act (Act March 2, 1893, c. 196, 27 Stat. 531 [Comp. St. 1913, Sec. 8605-8612]) as to make an authoritative construction of the latter act decisive of the former. The language of the second section of the latter act is that 'it shall be unlawful for any such common carrier to haul *or permit to be hauled* or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact'—language of identical import with that used in the statute under consideration." (Italics ours).

"The Supreme Court of the United States had before it, in St. Louis & Iron Mountain Ry. vs. Taylor, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061, the question of the liability of a railroad company not equipping its cars with drawbars of the standard height above the rails, as required by section 5 of the act, and the court held, speaking through Mr. Justice Moody, that:

" 'The obvious purpose of the Legislature was to supplant the qualified duty of the common law with an absolute duty, deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it.'

"Thus it rejected the defense sought to be interposed that the company had exercised reasonable care to keep the drawbars at a standard height, as not revelant under the statute. The result was to impose upon the carrier an absolute duty to keep its cars equipped as required by the act, and especially by the particular section 5.

"The appropriate construction of the act came again before the Court in C. B. & Q. Ry. v. United States, 220 U. S. 559, 31 Sup. Ct. 612, 55 L. Ed. 582, which arose under section 2 thereof. The precise question considered is stated by the Court as follows:

" 'Does the Act of Congress in question impose on an interstate carrier an absolute duty to see to it that no car is hauled or permitted to be hauled or used on its line unless it be equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars?'

"It was insisted that the question was not involved by the Taylor Case, and therefore not decided. But the Court held that it was not only so involved, but that the question was properly decided. See, also, Delk. v. St. Louis

& San Francisco R. R., 220 U. S. 580, 31 Sup. Ct. 617, 55 L. Ed. 590, a companion case, decided at the same time.

"So that, as it pertains to section 2 of the act, as well as the entire act, it has become the settled construction of the Supreme Court that there is thereby imposed upon the railroad an absolute duty, and the penalty prescribed cannot be escaped by the exercise of reasonable diligence. Without else, considering the similarity of the language of the two acts, and the purpose designed to be subserved by each, which is the protection of the public, as well as the protection and relief of employes, these cases would seem to be decisive of the present.

"The primary significance of the word 'permit' implies knowledge of the thing suffered or allowed to be done; but, as if to allay all question as to its appropriate meaning and application under the present statute, it is specifically declared that the carrier shall be deemed to have had knowledge of all the acts of all its officers and agents, thus rendering the statute in question much more explicit touching what was intended than the safety appliance statute.

"I conclude, therefore, that the duty imposed by the act is absolute, and that reasonable care or want of knowledge on the part of the officers and agents of the carrier constitutes no defense to a charge of requiring or permitting an employe to be or remain on duty overtime."

And in *United States vs. O.-W. R. & N. Co.*, 213 *Fed.* 688, the same conclusion, to-wit, that the hours of Service Act imposes an absolute liability upon the common carrier which cannot be evaded by any disclaimer of knowledge or intent, was reached in the Eastern District of Washington. In that case the Court said:

> "It is urged that the words 'require or permit' imply consent or knowledge on the part of the employer, and this is perhaps their common significance; but the word 'permit' also means a failure to prohibit by one who has the power and authority to do so, and in my opinion the term is here used in the latter sense."

In Funk and Wagnall's New Standard Dictionary of the English Language the primary definition of the word "permit" is given as follows:

> "To allow by tacit consent or by not hindering; take no steps to prevent; consent tacitly to; suffer; as, to permit oneself to be wronged."

And accordingly this Court (223 Fed. 596) affirmed the decision of the District Court for the Eastern District of Washington, last cited above. This Court (Cit., p. 598) stated the question on that hearing to be, "Was he *permitted* to be on duty in excess of that time?" (Italics ours). Then follows a statement of the facts of the case showing that at the station there in question there had been previously employed three telegraph operators beside the employe, Longabaugh, whose excess service was the basis of that action. That one of the operators had been discharged and that Longabaugh had been directed to work six hours as a telegraph operator and three hours as a station agent, thus supplementing the two nine hour shifts of the two remaining operators so as to fill out the full twenty-four hour period, leaving him an additional period of three hours in which to work as station agent. That the exigencies of the situation were such that Longabaugh found himself required to perform the duties of station agent for a period of twelve hours instead of three hours as directed. This Court concluded, under these facts, that to hold the company liable was not even a harsh application of the statute, for the reason that the company would seem to be charged with actual no-

tice of the excessive service which the exigencies of the situation required of Longabaugh.

Aside from the law of the case, it would seem that the case at bar furnishes sufficient basis for the same conclusion on the question of a harsh application of the statute. It is admitted that for four days, successive but for one exception, the employe performed a full shift as operator and thereafter performed other duties about the station. While the particular emergency which made this necessary is not set out, it is certainly a fair inference that circumstances rendered this excess service necessary. It is surely not to be inferred that, after rendering a full day's service as operator, he continued on duty about the station for several hours from choice. And it is further alleged in each count of the answer that the excess services were performed without the knowledge of *any* officer or agent of the company except the employe in question, so that if any inferences are to be indulged, the Court should infer that he was alone at the station at the time the excess service was rendered. Such being the case, the carrier must have known that fact, continued as it was over a period of four days. If not, certainly it should have known it, which is equivalent to knowledge. It would appear, therefore, that this case rests on very much the same footing as the Longabaugh case, so far as the complaint of harshness is concerned.

In further support of the general conclusion reached, we call attention to *San Pedro L. A. & L. R. Co. vs. United States*, 213 *Fed.* 326, decided by the Circuit Court of Appeals of the Eighth Circuit, to the effect that the command of this statute is laid on the carrier as employer, and not on the employe, and that as a highly remedial statute it should be liberally construed in such a manner as best to effect the purpose which it is intended to serve.

It has been pointed out in a number of authorities already cited that this Act is analogous to the Safety Appliance Act and that the construction placed upon that Act by the highest tribunal is effective to determine the purport and meaning of the Hours of Service Law. As stated in the opinion of the District Court for the District of Oregon, fully quoted above, the language of the two Acts is almost identical, even to the use of the word "permit." That that language is appropriate for the statement of an absolute liability, has been decided by the United States Supreme Court in the following cases: St. Louis, I. M. & S. R. Co. vs. Taylor, 210 U. S. 221, *supra; C.*, B. & Q. R. Co. vs. United States, 220 U. S. 559, *supra;* Delk vs. St. Louis & S. F. R. Co., 220 U. S. 580, *supra.*

It is contended by plaintiff in error that a carrier cannot be rendered liable for the voluntry or deliberate act of an employe. While this question is merged into, and determined by, the decisions holding the liability of the act to be absolute, we wish to call attention to a case involving this particular contention:

> "You are instructed that the law lays an unqualified duty upon a railroad company to keep its coupling devices in a certain prescribed condition, and, if an employe of such company deliberately puts such devices in another condition, which condition the law undertakes to prevent, then the company is liable to respond under the penalty for the unlawful act of the employe."
>
> United States v. Southern Pacific Co., 167 Fed. 699.

The lack of knowledge and due diligence on the part of the carrier so vigorously and ably urged in the brief of plaintiff in error has no place in an action brought to recover the penalty provided by the Hours of Service Act, except that it is to be considered by the Court in fixing the amount of that penalty.

"* * * the penalty is a deterrent, not compensation. The amount is not measured by the harm to the employes, but by the fault of the carrier * * *"

M. K. & T. R. Co. vs. United States, 231 U. S. 112, 58 L. Ed. 144.

In conclusion, we submit that in a case of service by an employe in excess of the hours prescribed by the Act in question, the liability imposed upon the carrier is absolute, and that no issue of knowledge or permission is open to the carrier upon which to base a defense. The occasional harshness of the Act is no concern of the Courts. If any other construction were to be placed upon this Act its enforcement would become impossible and it would be a dead letter upon the statute books. A carrier, by issuing a general order as in this case, would be immune from the terms of the Act for the reason that it would be a practical impossibility to prove actual knowledge and active consent on the part of the managing officers or agents of the carrier. This case very evidently arose, as nearly all cases under this Act arise, not out of the deliberate and wilful command or encouragement of any managing officer or agent of the carrier, but out of a *condition* which had been caused or permitted to arise, to-wit, a working force at a given point insufficient in number to handle the volume of business at that point without working in excess of the periods prescribed by the Act. It is not unreasonable or harsh to require the carrier to anticipate such a situation and to guard against violations of the law arising therefrom. Foresight and preparedness against emergencies are requisite in every business of any considerable proportions. And it is far better that, by the exaction from offending carriers of the penalty of this Act, the instances where by lack of such foresight and preparation excess service of employes becomes necessary should be reduced to a minimum, than that the Hours of Service Act should be rendered impotent by construction and the life and limb of employes and travelers thereby jeopardized.

We respectfully submit that the judgment of the trial Court should be affirmed.

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